

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

September 23, 1998

**IN RE: APPLICATION OF ELECTRIC)
POWER BOARD OF CHATTANOOGA)
FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO)
PROVIDE INTRASTATE)
TELECOMMUNICATIONS SERVICE)**

DOCKET NO. 97-07488

**ORDER ADOPTING THE REPORT AND RECOMMENDATION OF HEARING OFFICER
FROM THE PRE-HEARING CONFERENCE HELD DECEMBER 29, 1997, AS AMENDED**

This matter came before the Tennessee Regulatory Authority (the "Authority") for consideration of the Report and Recommendation of the Hearing Officer, attached as Exhibit A, from the Pre-Hearing Conference held in the above captioned matter on December 29, 1997. This Report and Recommendation was submitted for the consideration of the Authority by the Hearing Officer, Dennis McNamee.

The Authority granted interventions in this matter to AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. at the Authority Conference on November 18, 1997. At the December 2, 1997, Authority Conference the Directors granted intervention in this case to the Tennessee Cable Telecommunications Association, American Communications Services, Inc., and the Office of the Attorney General, Consumer Advocate Division. NextLink Tennessee, L.L.C. ("Nextlink") and the Tennessee Power Company requested intervention after the December 2, 1997, Authority Conference, and those requests were considered at the Pre-Hearing Conference.

The Report and Recommendation of the Hearing Officer was considered by the Directors at a regularly scheduled Authority Conference on February 17, 1998. The Hearing Officer reported to the Directors that both Nextlink and Tennessee Power Company were admitted as Parties at the Pre-Hearing Conference. The Hearing Officer advised the Directors that Tennessee Power Company was admitted as a Party as an interested member of the public, and was limited in participation to the issues in the instant proceeding, rather than to issues that it expressed in its Petition. The Tennessee Power Company did not have a representative present at the Pre-Hearing Conference for these discussions.

At the Authority Conference, during consideration of the Report and Recommendation, the Directors expressed their concern over the practice of companies that continue to file Petitions requiring consideration in cases before this Authority, but do not accord the Authority the courtesy of being present for discussion of those Petitions. The Hearing Officer also discussed a proposed schedule to completion with the Directors. An amended date and time for the Hearing was set as April 23, 1998, beginning at 9:00 A.M.

After reviewing the Report and Recommendation of the Hearing Officer, as well as appropriate portions of the record, and having amended the date and time for the Hearing and expressing reservations on the admission of Tennessee Power Company as a Party, the Directors unanimously determined that the Report and Recommendation of the Hearing Officer should be approved and adopted as amended.

IT IS THEREFORE ORDERED THAT:

1. The Report and Recommendation of the Hearing Officer from the Pre-Hearing Conference held on December 29, 1997, attached as Exhibit A, is approved as amended, and is incorporated as if fully rewritten herein; and
2. Any Party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from and after the date of this Order.


CHAIRMAN


DIRECTOR


DIRECTOR

ATTEST:


EXECUTIVE SECRETARY

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

'98 JAN 28 PM 12 19

IN RE: APPLICATION OF ELECTRIC)
POWER BOARD OF CHATTANOOGA)
FOR A CERTIFICATE OF PUBLIC) DOCKET NO. 97-07488
CONVENIENCE AND NECESSITY TO)
PROVIDE INTRASTATE)
TELECOMMUNICATIONS SERVICE)

REPORT AND RECOMMENDATION OF HEARING OFFICER FROM THE PRE-
HEARING CONFERENCE HELD DECEMBER 29, 1997

This is a case of first impression which is before the Tennessee Regulatory Authority ("Authority") pursuant to an Application filed on October 21, 1997, by the Petitioner, the Electric Power Board of Chattanooga ("EPB") for a Certificate of Public Convenience and Necessity ("CCN") to become a competing telecommunications service provider as defined in T.C.A. § 65-4-101(e) and T.C.A. § 65-4-201

I. Background

On October 29, 1997, AT&T Communications of the South Central States, Inc., and BellSouth Telecommunications filed petitions requesting intervention in this proceeding. On November 3, 1997, the Authority issued a Notice of Hearing, scheduling the Hearing on December 2, 1997. On November 7, 1997, the Authority issued data requests to the Electric Power Board of Chattanooga. These questions were associated with the statutory duties imposed under T.C.A. §§ 7-52-401 and 402. A copy of these statutes are attached to this Report as Attachment 1. Thereafter, on November 15, 1997, EPB moved for an extension of time to answer the data requests until December 10, 1997, and that the Hearing date be postponed until on or about January 14, 1998.

On November 12, 1997, the Tennessee Cable Telecommunications Association filed for intervention followed closely on November 19, 1997, by American Communications Services,

EXHIBIT A

Inc., and on November 26, 1997, by the Consumer Advocate Division. On December 2, 1997, at its regularly scheduled Director's Conference, the Authority approved the Motion of EPB for an extension of time to file answers to the Authority's data requests and postponed the Hearing date. During discussion of this matter at the Director's Conference, the parties to the proceeding indicated that it would be necessary to take discovery and to hold a Pre-Hearing Conference to refine the issues. The Authority appointed Dennis P. McNamee, the General Counsel or his designee, to serve as Hearing Officer for this case to refine the issues and set a procedural schedule at the Pre-Hearing Conference.

NEXTLINK, Tennessee filed for intervention on December 5, 1997, and Tennessee Power Company intervened on December 23, 1997. A Notice of the Pre-Hearing Conference was issued on December 15, 1997, to be held on December 29, 1997. On December 29, 1997, EPB filed an Objection to the Intervention of Tennessee Power Company or Motion to Limit their participation to the issues in the proceeding. On January 2, 1998, subsequent to the Pre-Hearing Conference, MCI Telecommunications Corporation also filed for leave to intervene.

The Pre-Hearing Conference in this proceeding was held on December 29, 1997, at 1:30 P.M. for the limited purposes of (1) considering interventions, (2) determining a statement of issues, (3) obtaining admissions of fact and documents which will avoid unnecessary proof, (4) limiting expert witnesses, if appropriate, and (5) establishing a discovery schedule and Hearing date. The Pre-Hearing Conference was conducted pursuant to T.C.A. § 4-5-306. The following appearances were entered in the proceeding:

Carlos C. Smith, Esq., William C. Carriger, Esq., and Mark W. Smith, Esq., Strang Fletcher, Carriger, Walker, Hodge & Smith, PLLC, 400 Krystal Building, Chattanooga, TN 37402, for the Electric Power Board of Chattanooga,

Patrick Turner, Esq., for BellSouth Telecommunications, Inc., 333 Commerce Street, Nashville, TN 37201

Charles B. Welch, Jr., Esq., Farris, Mathews, Gilman, Branan & Hellen, P.L.C., for the Tennessee Cable Telecommunications Association

Henry Walker, Esq., Boulton, Cummings, Conners & Berry, P.O. Box 198062, Nashville, TN 37201, for ACSI and, in limited representation, for **Dana Shaffer, Esq.,** NEXTLINK, Tennessee

Val Sanford, Esq., Gullett, Sanford, Robinson & Martin, P.O. Box 198888, Nashville, TN 37219, for AT&T Communications of the South Central States, Inc

Counsel for EPB participated by telephone. Also participating by telephone for EPB was Ron Fugett, executive vice-president, and Steve Lawrence, vice president of engineering.

II. Interventions

Prior to the Pre-Hearing Conference, the Authority granted interventions to AT&T Communications of the South Central States, Inc., BellSouth Telecommunications, Tennessee Cable Telecommunications Association, American Communications Services, Inc., and the Office of the Attorney General, Consumer Advocate Division.

NextLink, Tennessee ("NEXTLINK"), and the Tennessee Power Company requested intervention after the December 2, 1997, Director's Conference, and were considered at the Pre-Hearing Conference. There was no objection to the admission of NEXTLINK, Tennessee to the proceeding, and the Hearing Officer grants its intervention. The Order granting the NEXTLINK, Tennessee intervention is attached as Attachment 2. There was discussion concerning the admission of Tennessee Power Company.

On December 29, 1997, EPB filed an Objection to the Intervention of Tennessee Power Company or Motion to Limit their participation to the issues in the proceeding. The Hearing Officer was presented with a copy of the Objection and Motion prior to the Pre-Hearing Conference, and the Objection and Motion were considered at the Pre-Hearing Conference. Tennessee Power Company is a single consumer who has an interest in electric power and associated matters, and at one time worked for the Tennessee Valley Authority ("TVA"). EPB is familiar with this individual and informed the Hearing Officer that this individual occasionally participates in cases at the Federal Energy Regulatory Authority. The Hearing Officer notes the objection of EPB. It is the opinion of the Hearing Officer that the liberal intervention policy of the Authority permits the Tennessee Power Company access to our process and proceedings, however, the Hearing Officer also notes that many of the concerns in the Tennessee Power Company intervention do not strictly coincide with these proceedings. Therefore, the Hearing Officer grants the intervention of the Tennessee Power Company, but also grants the Motion of EPB to limit the participation of Tennessee Power Company to the issues in this proceeding. A

copy of the Hearing Officer's Order granting Tennessee Power Company intervenor status and limiting their participation to the issues in this proceeding is attached as Attachment 3

III. Determining a Statement of Issues

In the Notice of the Pre-Hearing Conference, dated December 15, 1997, the parties were encouraged to submit a statement of the issues in the case to the Hearing Officer not later than December 22, 1997, for inclusion in the Pre-Hearing Conference Agenda. A copy of the Agenda for the Pre-Hearing Conference incorporating the issues from the parties is attached to this Report as Attachment 4. With the exception of EPB, the parties expressed agreement that there were issues that needed to be resolved before a CCN could be issued and EPB could file a tariff. Several parties expressed that as a case of first impression these issues needed to be resolved, if only to set policies and procedures for future applicants.

III(a). Threshold Issue: is the Electric Power Board subject to the provisions of T.C.A. § 65-5-208(c)?

The parties expressed concern at the Pre-Hearing Conference that there should be a square one demonstration that EPB will comply with statutory provisions against cross subsidization. The pertinent section of T.C.A. § 65-5-208(c) states

Effective January 1, 1996, an incumbent local exchange telephone company shall adhere to a price floor for its competitive services subject to such determination as the authority shall make pursuant to § 65-5-207. The price floor shall equal the incumbent local exchange telephone company's tariffed rates for essential elements utilized by competing telecommunications service providers plus the total long-run incremental cost of the competitive elements of the service. When shown to be in the public interest, the authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirement of the price floor. **The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices** (Emphasis added)

EPB believes that this provision only applies to Incumbent Local Exchange Carriers, the parties disagree, and feel that this issue must be addressed

III(b). Threshold Issue: should the EPB be required to demonstrate compliance with T.C.A. § 7-52-401, et. seq., prior to consideration of their Application to become a competing telecommunications provider?

The statutes with which the parties expressed concern are

- 7-52-401. Authority with relations to telecommunications equipment and services
- 7-52-402 Subsidies - Municipal costs.
- 7-52-403. Applicability to municipalities - Municipalities subject to regulatory laws and rules
- 7-52-404. Tax equivalent payments
- 7-52-405. Allocation of costs by municipalities.
- 7-52-406. Licensing laws not superseded - Applicability to cable services
- 7-52-407. Supersession of conflicting laws

III(c). Is a rulemaking procedure necessary before or after this proceeding to continue to determine compliance pursuant to T.C.A. § 7-52-401, et. seq.?

If there is a determination that a rule making procedure is necessary before or after this proceeding to allow for determination of compliance under T C A § 7-52-401, et. seq, then the parties suggested that some questions which needed to be answered were

- A What rules and/or reporting requirements are necessary to ensure compliance with T C A §7-52-402(2)?
- B What rules are necessary to ensure EPB's compliance with T C A §7-52-404?
- C What reporting requirements are necessary?
- D. What rules and/or reporting requirements are necessary to ensure EPB's compliance with T C A. §7-52-405?

III(d). Issues for Certification of EPB as a Competing Telecommunications Provider.

- 1. Whether, in accordance with T.C A. § 65-4-201(c)(l), the EPB has demonstrated that it will adhere to all applicable policies, rules and orders of the Tennessee Regulatory Authority,

a) Is the EPB presently capable of complying with all existing policies, rules, and orders of the Authority in the same manner and to the same extent as other certificated providers of telecommunications services including, without limitation, rules or orders governing anti-competitive practices?

b) Insofar as the requirements of the City of Chattanooga are concerned, what will be the difference, if any, between what is required of the EPB and investor-owned telecommunications service providers operating within its limits?

c) Are the limitations imposed on the EPB by its wholesale power contract with the TVA enforceable by anyone other than the TVA, or otherwise adequate to meet the limitations imposed by Chapter 531 of the Public Acts of 1997 and of T C A § 65-5-208(c)?

d) In view of the position of the EPB as a municipally owned, monopoly provider of electric power services, should the Authority impose special accounting, cost allocation, reporting, marketing and tariff requirements in order to assure compliance with T C A §65-5-208(c)?

2 Whether, in accordance with T C A § 65-4-201(c)(2), the EPB possesses sufficient managerial, financial and technical abilities to provide the applied-for services

a) What portion of the EPB's electric plant is to be allocated to telecommunications services and how will the costs be allocated to telecommunications services for regulatory purposes?

b) To what extent, and by what authority, is the EPB "independent" of the City of Chattanooga, as stated in the Application?

c) Does the City of Chattanooga require telecommunications service providers operating within its limits to obtain franchises or rights-of-way agreements from the City and pay to the City, fees, rentals or other charges?

d) Is the City of Chattanooga or the EPB in the issuance of evidences of indebtedness subject to the provisions of T C A § 65-4-109?

e) To what extent will the EPB jointly market, or otherwise collaborate in the offering of, its telecommunications and its power services and should limitations be placed on such joint marketing or other collaboration?

f) Should the power of the EPB over pole attachments be considered by the TRA in determining the criteria necessary to assure compliance with T.C.A §65-5-208(c)?


3 Whether the small and minority-owned telecommunications business participation plan attached to the EPB's Application satisfies the requirements of T C A § 65-4-212.

IV. Discovery Schedule and Hearing Date

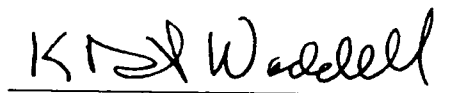
Discovery requests	January 28, 1998
Answers to Discovery requests	February 13, 1998
Prefiled Testimony	February 27, 1998
Pre-Hearing briefs	March 13, 1998
Rebuttal Testimony	March 13, 1998
Reply briefs	April 1, 1998
Hearing	April 23, 1998
Post Hearing Briefs	May 15, 1998

All submissions are due in the Office of the Executive Secretary of the Authority not later than Noon on the due date Facsimile submissions will not be accepted, and the Authority reserves the right to modify this schedule at any time

Respectfully submitted,


Dennis P. McNamee, General Counsel, Acting as
Hearing Officer

ATTEST


K. David Waddell